Supreme Court, U. S.
FILED
APR 16 1980
MICHAEL RODAK, JR., CLERK

79-1630

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

BOARD OF EDUCATION OF MEMPHIS CITY SCHOOLS, *et al.*,
Petitioners,

v.

DEBORAH A. NORTHCROSS, *et al.*,
Respondents,

and

CITY OF MEMPHIS, *et al.*,
Additional Defendants and Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CLIFFORD D. PIERCE, JR.
City Attorney
FRIERSON M. GRAVES, JR.
2020 First Tennessee Bldg.
Memphis, Tennessee 38103
Telephone: (901)525-8231
Attorneys for Petitioners
City of Memphis, et al.,
Additional Defendants

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Companion Petition	1
Opinions Below	2
Jurisdiction	3
Questions Presented	3
Constitutional and Statutory Provisions Involved	5
Statement of the Case	6
History of the Litigation	6
Proceedings in the District Court	7
Proceedings in the Court of Appeals for the Sixth Circuit	10
Reasons for Granting the Writ	14
1. The decision of the Sixth Circuit is inconsistent with the intent and meaning of the Civil Rights Attorney's Fees Awards Act of 1976	14
2. There is a conflict between the United States Court of Appeals for the Sixth Circuit and other Circuit Courts of Appeals on the standards to be used in awarding fees	17
3. The issue is of importance to local and state governmental agencies and for the Federal Judiciary	18
Conclusion	20

Citations

Table of Cases

Boe v. Collello, 447 F. Sup. 607 17

Johnson v. Georgia Highway Express, 488 F.2d 714 14,15

King v. Greenblat, 560 F.2d 1024 17

Lamphere v. Brown University, 610 F.2d 46 18

Morehead v. Lewis, 432 F. Sup. 674 17

Statutes

20 U.S.C., §1617 5,6,8

42 U.S.C., §1988 5,6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

BOARD OF EDUCATION OF MEMPHIS CITY SCHOOLS, *et al.*,
Petitioners,

v.

DEBORAH A. NORTHCROSS, *et al.*,
Respondents,

and

CITY OF MEMPHIS, *et al.*,
Additional Defendants and Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners City of Memphis and Additional Defendants pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on November 23, 1979.

COMPANION PETITION

The Board of Education of the Memphis City Schools has also filed a petition for writ of certiorari to review this same case. The applicable opinion of the United States Court of Appeals for the Sixth Circuit and the District Court opinions are printed in the appendix to the petition of the Board of Education of the Memphis City Schools and the Court is referred

thereto for those opinions. Certain of the factual matters and questions raised by that petition are common to this petition and others which would be more applicable to the City of Memphis and are stated herein.

The City of Memphis and Additional Defendants concur in the petition for certiorari by the Board of Education of the Memphis City Schools and urge those portions as would be applicable to the City of Memphis.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 611 F.2d 624 and is printed in the Appendix of the Petition for Writ of Certiorari of the Board of Education of the Memphis City School System also filed to which the Court is referred. Two of these unreported decisions applicable to the City of Memphis are in the Appendix of the Board's Petition and are the District Court's "Ruling on the Application of the Plaintiffs for Attorney's Fees" dated March 24, 1976, and the "Award on Application of the Plaintiffs for Attorney's Fees" entered November 4, 1977. Prior reported opinions of the United States Court of Appeals for the Sixth Circuit applicable to the issues involving the City of Memphis are found at 489 F.2d 18 and 489 F.2d 19.

Other prior reported Opinions in this matter are found at 302 F.2d 818 (6th Cir.), *cert. denied*, 370 U.S. 944 (1962); 333 F.2d 661 (6th Cir. 1964); 420 F.2d 546 (6th Cir. 1969); 420 F.2d 548 (6th Cir.), *remanded*, 397 U.S. 232 (1970); 312 F.Sup. 1150 (W.D. Tenn. 1970), *remanded*, 444 F.2d 1179 (6th Cir. 1971); 444 F.2d 1184 (6th Cir. 1971); 341 F.Supp. 583 (W.D. Tenn.), *vacation* of stay denied, 463 F.2d 329 (6th Cir.), *remanded*, 466 F.2d 890 (6th Cir.), *stay denied*, 309 U.S. 909 (1972), *cert. denied*, 410 U.S. 926 (1972), *vacated in part and remanded on other grounds*, 412 U.S. 429 (1973); and 489 F.2d 15, *cert. denied*, 416 U.S. 962 (1974).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on November 23, 1979. The Board of Education of the Memphis City Schools petitioned for rehearing which was denied on January 17, 1980. The City of Memphis and Additional Defendants filed an application for extension of time in which to file petition for writ of certiorari in February, 1980, and on February 11, Justice Stewart granted an order extending time to file petition for writ of certiorari to April 16, 1980, coinciding with the due date for the petition for certiorari by the Board of Education of the Memphis City Schools.

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Sixth Circuit properly interpret the Civil Rights Attorney's Fee Awards Act of 1976 by determining that the number of hours expended by the attorney will take into account all the relevant factors in making an award of a fee and lead to reasonable results although this eliminates the ability of the District Court in its discretion to determine the reasonableness of the number of hours and to eliminate excessive or unnecessary time?

2. Did the United States Court of Appeals for the Sixth Circuit properly interpret the Act by determining that the normal billing rate of the Plaintiffs' attorney will reflect the skill requisite to perform legal services properly, the customary fee, and the experience, reputation and ability of the attorney?

3. Did the Circuit Court of Appeals properly interpret the Act to permit adjustments of the fee upwards by a percentage to reflect the contingency of the fee, unusual time limitations and undesirability of the case?

4. Is the Court of Appeals' interpretation of the Fee Act proper in that all time reasonably expended on the matter by attorneys should be compensated even though the time is spent pursuing issues which are ultimately unproductive, rejected by the court, or mooted by intervening events unless the positions asserted are frivilous or in bad faith?

5. Was the Court of Appeals in error in not allowing the discretion of the District Court to reduce awards which the Court from its experience believes should be reduced because in the Court's opinion, an excessive amount of time was spent upon the particular matter even if the plaintiff had prevailed on said issue, therefore removing all discretion from the District Court?

6. Is the Court of Appeals in error in determining that a district court should not eliminate claimed hours of an attorney which the court, in its discretion, determined were duplications, but should simply deduct a small percentage of the total hours to eliminate duplication?

7. Is the Court of Appeals correct in determining that once the party has prevailed, you cannot, in a complicated lawsuit, separate issues or parts of issues to eliminate claims for fees on a matter in which the plaintiff did not prevail?

8. Is a plaintiff's attorney entitled to a fee under the Civil Rights Attorney's Fee Awards Act of 1976 for volunteered legal services rendered in three suits filed by the Board of Education against the Added Defendant City of Memphis where there is no claim that attorneys for the Board of Education were incompetent or did not effectively represent their clients in the three suits against the City of Memphis?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

20 U.S.C. §1617. *Attorney fees*

Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. §1988. *Proceedings in vindication of civil rights*

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This petition for writ of certiorari seeks to have this Court review a decision of the United States Court of Appeals for the Sixth Circuit, which establishes standards for the guidance of all courts within that Circuit for the determination of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976. The Sixth Circuit also determined that such same standards would be applicable to 20 U.S.C. §617 of the Emergency School Aid Act. The opinion is far reaching in that the Court stated:

> In this opinion, the Court will address a few of the remaining legal controversies concerning the proper application and interpretation of 42 U.S.C. §1988, the Civil Rights Attorney' Fees Awards Act of 1976 . . . and sets out standards for the guidance of the district courts in this Circuit to aid them in the exercise of their discretion in the granting of such fees.

History of the Litigation

This case involves two separate awards of attorney's fees against the Memphis Board of Education and one award against the City of Memphis and Added Defendants. The Plaintiffs' original request for attorneys' fees was filed on August 1, 1974. There was a subsequent request for fees which grew out of a 1977 hearing and is discussed in the petition by the Memphis Board of Education. The main request for fees involved the decision which also included the City of Memphis. The Plaintiffs' attorneys sought a fee for services dating back to the original filing of the lawsuit in 1960. The City of Memphis was involved because the Board of Education had brought three proceedings againt the City of Memphis who had been added as a defendant *for those proceedings only*. The Board of Education had sought to enjoin or otherwise litigate with the City of Memphis because of alleged interference by the City of Memphis with the plan of desegregation.

The request of the Plaintiffs' attorneys against the Board of Education included a request to adjust upward the basic fees by two and one-half times, making a total request against the Board of Education of $905,462.50. The same adjustment was requested against the City of Memphis to make the claim for fees to be $50,762.50.

Such an *outrageous* and *preposterous* demand for fees made it mandatory that the City of Memphis, as well as the Board of Education, resist the application for fees. The City of Memphis, likewise, raised the issue that the hourly rates claimed by the attorneys for the Plaintiffs were excessive and that the hours claimed were neither necessary nor reasonable. It was further contended by the City of Memphis that the participation by the Plaintiffs was voluntary and unnecessary and that the Board of Education was represented by competent counsel advocating an adversary position to the City of Memphis and that the Plaintiffs and respondents were volunteers in the litigation. It was further contended that the proceedings involving the City of Memphis were separate and distinct and that the Plaintiffs were not a prevailing party in any of the City issues and certainly in an issue charging antitrust against the City, the U.S. Department of Interior and Exxon which was dismissed. It was further contended that the issues involving the City of Memphis had been terminated in 1973, long before the Civil Rights Attorney's Fees Awards Act of 1976.

Proceedings in the District Court

The District Court filed two opinions on the award of fees claimed by Plaintiffs' attorneys from the period of 1960 through 1974. The opinions included findings on the three issues between the Board of Education and the City of Memphis. All parties agreed that the District Court would rule first on the general time period and types of services which would be subject to an award of attorney's fees. This ruling was prior to the effective date of the Civil Rights Attorney's Fee Awards Act

of 1976 and construed the Emergency School Aid Act of 1972, 20 U.S.C. §1617. The petition of the Board of Education reviews the District Court discussion of numerous unnecessary positions taken by the Plaintiffs throughout the litigation in separate motions hearings. The Court did not award attorney's fees for this unnecessary time. The District Court determined that it would not deny a fee in toto, but that the ultimate fee would be reduced to account for the Plaintiffs' rejected assertions which prolonged or delayed the overall proceedings. The Court also ruled as to the timeliness of the request for certain fees, dating back to the beginning of the litigation. The Court ruled that as to the Board of Education, fees would be awarded for necessary time in the litigation after July 1, 1972, and there would be an award to the Plaintiffs' attorneys for certain time prior to 1972 under the obdurate obstinancy test.

The Court awarded fees against the City of Memphis to the Plaintiffs' attorneys. The Court noted that the City and the Board of Education were adversaries. There was no suggesstion that the Board or its attorney was obstinate in attempting to comply with the bus transportation order. The Court determined that the Board was the primary instigator and aggressor in the disputes pertaining to the City but that the Plaintiffs, acting through their attorneys, joined in and supplemented the contentions of the Board and regularly participated in the proceeding. Although the Court did not find the Board's attorneys were not competent or aggressive in the pursuit of these remedies, the Court allowed the Plaintiffs' attorneys' fees because the City officials were attempting to hinder desegregation and the overall attitude and approach of the Board in the past had hardly been one of willingness. This seems inconsistent in that the Board of Education attorneys had acted both first and promptly in all of these matters and it had obtained temporary injunctions or requested hearings prior to any action being taken by the Plaintiffs' attorneys who merely joined in to supplement and in some cases to request exaggerated relief which the Court never granted.

The District Court in the second hearing after the submission of detailed briefs and affidavits granted an award of fees. The Court eliminated not only hours which were duplicative but eliminated, in the discretion of the Court, unnecessary time as well as eliminated time on matters which the Court thought should be separate issues and in which the Plaintiffs' request was rejected and, therefore, Plaintiffs did not prevail.

Fees were allowed against the City of Memphis in the amount of $6,930.00. The Court in making its award against the City of Memphis eliminated any time for a supplemental complaint charging conspiracy under the antitrust brought by the Plaintiffs against Exxon, the United States Department of Interior, the Secretary of Interior and the City of Memphis and its various officials. The complaint charged conspiracy between all of these parties to deny the Board of Education the gasoline, which complaint was subsequently dismissed. The Court of Appeals without any support in the record found this complaint induced the City of Memphis to provide the gasoline. The District Court likewise eliminated hours either unnecessry or through duplication of efforts by the Plaintiffs' attorneys.

The Plaintiffs appealed not only the award against the Board of Education but the award against the City of Memphis. After the Plaintiffs had appealed, the City of Memphis thereafter filed its cross-appeal to protect its interest contending that the participation by the Plaintiffs' attorneys was voluntary and unnecessary. The City also contended the Plaintiffs were not the prevailing party since the Plaintiffs' attorneys made different requests than those sought by the Board of Education and those requests were denied. The hourly rate found by the Court was challenged as excessive in light of the prevailing rates for attorneys of similar experience and ability in the community.

Proceedings in the Court of Appeals for the Sixth Circuit

The Court of Appeals in this important decision for all courts in the Sixth Circuit remanded the case to the District Court to determine the attorney's fees for the period of at least 1968 through 1974, and to consider the fees prior to that date against the Board of Education as well as to reconsider the amount of the fees against the City of Memphis in light of the standards set by the opinion.

The Sixth Circuit said that its opinion was to settle the controversies and to:

> Set out standards for the guidance of the District Court in this Circuit to aid them in the exercise of their discretion in the granting of such fees.

The Court of Appeals, however, in interpreting the Civil Rights Attorney's Fee Awards Act of 1976, appears to have departed substantially from the intended construction by Congress which will have a far-reaching effect upon municipalities, counties, state governments and others who would be liable for attorney's fees under the Attorney's Fee Awards Act.

The Court in its conclusion established a formula inconsistent with the statutory interpretation by providing that reasonable attorney fees would be (1) the hours listed by the attorney times (2) the normal billing rate of the attorney, (3) plus an adjustment upward to reflect contingency, unusual time limitations, or undesirability. There could be a small percentage reduction for duplication. The Court in reaching this rule stated in its conclusion as follows:

> We conclude that an analytical approach grounded on the number of hours expended on the case, will take into account all the relevant factors, and will lead to a reasonable result. The number of hours of work will automatically reflect the "time and labor involved," "the novelty and

> difficulty of the question," and "preclusion of other employment." The attorney's normal hourly billing rate will reflect "the skill requisite to perform the legal service properly," "the customary fee," and "the experience, reputation and ability of the attorney." Adjustments upward may be made to reflect the contingency of the fee, unusual time limitations, and "the undesirability" of the case.

The Court of Appeals interpreted the statement in the legislative history, that the prevailing party should be paid "as is traditional with attorneys compensated by a fee-paying client, for all time reasonably expended on the matter," to mean as follows:

> Once that issue is determined in the plaintiff's favor, they are entitled to recover attorneys' fees for "all time reasonably spent on a matter." The fact that some of that time was spent in pursuing issues on research which was ultimately unproductive, rejected by the court, or mooted by intervening events is wholly irrelevant. So long as the party has prevailed on the case as a whole, the district courts are to allow compensation for hours expended on unsuccessful research or litigation, unless the positions asserted are frivilous or in bad faith.

The Court of Appeals stated that it knew of no traditional method of billing whereby an attorney offers a discount based upon his or her failure to prevail on issues or parts of issues. The Court makes no finding that a case may be fragmented or may have separate proceedings for some of which the attorneys for the plaintiff should not be compensated.

While the Court of Appeals does indicate that hours may be cut for duplication, padding or frivilous claims, duplication is to be done by use of a small percentage such as the five percent (5%) suggested, rather than the District Court exercising its

discretion as to what hours should be eliminated for duplication. Although the Court indicates that some services by attorneys may be compensated at a lower rate than normal, the Court concludes that a fee calculated in the term of hours of service provided is the fairest and most manageable approach. The Court took away from the district courts any discretion to eliminate unnecessary services. The word "padding" could not be construed by a district court to allow the elimination of hours. The court, based upon its experience and judgment, could not determine that an attorney spent more hours than necessary on a particular matter so as to eliminate the unnecessary time.

The Court's opinion is not only applicable to the Civil Rights Attorney's Fee Awards Act, but also the Emergency School Aid Act since the Court considers there is no substantial differences between the provisions or purposes of the Acts.

While the Court indicated it knew of no rule whereby an attorney offers a discount, the Court of Appeals as well as any district court knows from experience that a lawyer in private practice many times does not charge for all hours spent because of the circumstances of the case. Certain research found unnecessary or certain motions will be discounted, and unproductive time may not be charged to the client.

The Court of Appeals discounts the legislative history that you should look to the customary rates in the community for similar services for guidance but holds that the fee should be the normal fee of the attorney for his service, since that will reflect his training, background, experience, and skill. In fact, the routine hourly rate charged by the attorneys is not the maximum but appears to be the minimum because contingency, time restraints or unpopular cause require the fee to be increased.

Finally, the Court of Appeals stated that inflation is a factor and that the intervening time between the services rendered and the request for fees must be taken into account so that the Court

can pay the normal fee rate of the attorney at the present time as opposed to the rate at the time the services were performed regardless of when the request was made or when, even though there may be delays caused by the court or by the Plaintiffs' attorneys.

This far reaching decision of the Court of Appeals is to guide not only school desegregration cases but all cases in which municipalities, counties or state governments would be called upon to pay fees from tax funds.

REASONS FOR GRANTING THE WRIT

This case raises an important issue on the interpretation of the Civil Rights Attorney's Fees Awards Act of 1976. The United States Court of Appeals for the Sixth Circuit, by its opinion, has established guidance for all of the district courts in that Circuit. The Court of Appeals does not follow the Congressional intent, and it is in conflict with the interpretations of other Circuits on the award of attorney's fees. There are also inconsistencies throughout some of the Circuits in the interpretation of the Act. The issue is of national importance in view of this Court's decisions which allows the awarding of fees, not only against municipalities and counties, but even against state officials, all of which will be paid from the public treasury. There is continued growing litigation, and we urge this Court to consider this case and any others involving this substantial question so that not only the Sixth Circuit but all courts as well as local and state governmental bodies would be advised of the standards to be used in awarding fees.

1. The Decision Of The Sixth Circuit Is Inconsistent With The Intent And Meaning Of The Civil Rights Attorney's Fees Awards Act Of 1976.

The decision of the United States Court of Appeals for the Sixth Circuit improperly interprets the legislative history and reaches a meaning and intent inconsistent with the legislative history. The legislative history as set forth in Senate Report No. 94-1011, indicates the appropriate standards for awarding a fee as set forth in *Johnson* v. *Georgia Highway Express,* 488 F.2d 714, had been correctly applied in certain cases. The Sixth Circuit disregards this interpretation and concludes that an approach grounded in the number of hours expended will automatically reflect most of the elements. The Court also demonstrates that the normal hourly billing rate of the attorney will reflect a number of the elements and indicates an upward adjustment of a percentage amount would reflect the contingency

of the fee, unusual time limitations or the undesirability of the case. This is not the standard intended by Congress. The standard was not to provide any windfall, but to provide counsel as is traditional with attorneys compensated by a fee-paying client for all time reasonably expended on a matter. Unreasonable expenditure of time which a district court might determine was unnecessary or the determination that services could have been performed in a lesser amount of time should be subject to adjustment in the discretion of the district courts. The Sixth Circuit does not permit this adjustment. The Court excludes what Congress approved in *Johnson* v. *Georgia Highway Express, Inc.* wherein that court said that the hours claimed should not be the sole determination and

> The trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities.
>
> 488 F.2d at 717.

Congress also intended that the same standards for other complex litigation be used. Unnecessary time, duplication of time or time spent for certain phases of a case which should not be charged against a fee-paying client should also not be charged against a defendant governmental agency ordered by a court to pay the fee.

The Sixth Circuit removes that discretion by its interpretation of this Act.

Congress also intended that, in appropriate circumstances, a fee could be awarded pendente lite. Such award would be appropriate where a party had prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. The converse would be true and separate issues in a lawsuit in which the plaintiff did not prevail should be excluded by the Court in its discretion in determining the number of hours that should be compensated. The Sixth Circuit has deter-

mined that except for duplicity which is reduced by a small percentage, frivolous claims, or padding, that all hours should be compensated even though ultimately unproductive, rejected by the court, or mooted by intervening events. In fact, the Sixth Circuit says that so long as the party prevails on the whole case, all hours expended on unsuccessful research should be compensated unless the positions asserted are frivolous or in bad faith. This Court, as well as all courts, know from their experience that fee-paying clients in private litigation do not pay for all hours automatically and that in many cases, there are reductions because of hours spent on matters which are either not presented to the court, not found to be necessary or because of the nature of the case, there should be a reduction by the attorney in the amount of his bill for services. This is why Congress intended that in considering the traditional pay from fee-paying clients, that you would eliminate unnecessary hours, duplication and allow for reduction, as the Court in its own experience would determine. More hours than were necessary could be spent to prepare a complaint and memorandum or other matters. These hours would have been spent by the attorney and would not be "padding" but would still be unnecessary. While the attorney's hourly rate might show his skill, it would not necessarily be his skill in the particular area. The Sixth Circuit, by its opinion, has eliminated the discretion of the district court. The effect is to require district courts to award fees in excess of those which should legitimately be awarded against local and state governmental bodies and their officials.

Because of the increasing litigation in areas involving civil rights, and the increasing demand for fees, this Court should construe the intent of Congress and give guidance to District and Circuit courts on the standards that should be used in awarding fees.

2. There Is A Conflict Between The United States Court Of Appeals For The Sixth Circuit And Other Circuit Courts Of Appeals On The Standards To Be Used In Awarding Fees.

Other circuits and District Courts within those circuits have held in many cases contrary to the opinion by the United States Court of Appeals for the Sixth Circuit. The District Court Judge in *Morehead* v. *Lewis,* 432 F.Sup. 674, applies the rule in his circuit and the Fifth Circuit that a court must not simply accept the attorneys' account of the value of their services, nor should they be compensated for unnecessary work. The court itself is an expert on the question and may consider its own knowledge and experience. The hours claimed or spent on a civil rights case is not the sole basis for a court's decision. As stated on *Boe* v. *Colello,* 447 F.Sup. 607, applying the Second Circuit's rule, the hours will be the lodestar figure. However, the Court need not readily accept the number of hours. The Court, from its experience may exclude any expenditure of time beyond that which is reasonably required and any expenditure beyond this, suggests either inexperience and devotion of more time than warranted to fairly and properly present claims, or alternatively, that the attorney engaged in dilettantism. The Court said that a losing side is not required to pay for such indulgences. Undoubtedly, parties to a litigation may fashion it according to their own purse and indulge themselves and their attorneys, but they may not foist their extravagances upon their unsuccessful adversaries. The First Circuit in *King* v. *Greenblat,* 560 F.2d 1024, follows the rule as also stated in the Fifth Circuit that an attorney's time is not a talisman. The District Court should scrutinize it with care, weigh the hours claimed against the judge's own knowledge and experience of the time required to complete similar matters not only unnecessary hours but duplicate hours will be reviewed. The First Circuit, as well as others, permits no recovery upon issues which are separable and upon which the plaintiff did not prevail. In fact while counsel

should not be penalized for every lost motion, claims have been denied when the issues are truly "fractionable." *Lamphere* v. *Brown University,* 610 F.2d 46 (1st Cir. 1979).

The Fifth Circuit has continued to follow its leading case of *Johnson* v. *Georgia Highway Express,* 488 F.2d 174, and to use the discretion of the court in eliminating unnecessary time, reducing the hours of an attorney because in the court's experience the time spent should be less, eliminating duplication and setting the fee in accordance with the rate in the community for the particular work in accord with the attorney's skill and experience regardless of the attorney's stated hourly rate.

The array of authorities on attorney's fees is increasing rapidly. Although there are discrepancies within the other circuits which the Court should address, the opinion of the United States Court of Appeals for the Sixth Circuit rejects both the congressional intent and the right of the district court to use its discretion to eliminate unnecessary hours. The standards adopted by the Sixth Circuit will result in exaggerated claims and excessive fees against local and state governmental bodies. The Court should address this conflict with other circuits and provide uniform standards throughout the Federal Judiciary System.

3. The Issue Is Of Importance To Local And State Governmental Agencies And For The Federal Judiciary.

This Court has the prime responsibility for supervision of the Federal Judiciary System. The need for uniformity in the interpretation of this Congressional Act is of prime importance. Local and state governmental units throughout the nation are facing constant suits requesting awards for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976. This opinion will be applicable to untold numbers of governmental units in the Sixth Circuit. We contend that the Court has improperly interpretated the Act in accordance with the intent of Congress

and is in conflict with interpretation in other circuits. Not all of the other circuits are in uniform accord as to the standards to be used.

The purpose of the Act is to assure competent counsel will represent individuals in matters involving civil rights and that the counsel will receive reasonable compensation. Under the interpretation by the Sixth Circuit, an individual could spend 100 hours on a legal issue and request compensation. The hours would not be padded but the Court would know from its experience that similar research drafting or other legal work could have been done in 25 hours. If the plaintiff prevails and there are no duplicated services, courts would be required to apply the normal hourly rate for the hours in question with the possible adjustment for inflation or contingency or other reasons as set forth in the opinion. Additional unsuccessful research, rejected points and matters which the court would not consider frivolous or brought in bad faith would be compensated regardless of what the trial judge in his discretion thought proper.

We believe that the uniform application of the Act requires the Court to examine this case and such others as might petition the Court to establish uniform principles for interpretation of the Civil Rights Attorneys' Fees Awards Act of 1976 in accordance with the intent of Congress.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

Clifford D. Pierce, Jr.
Frierson M. Graves, Jr.
2000 First Tennessee Building
Memphis, Tennessee 38103
Telephone: (901) 525-8231
Attorneys for Petitioners,
City of Memphis and Added
Defendants

CERTIFICATE OF SERVICE

This is to certify that I have this day served upon opposing counsel this Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit by mailing three copies thereof, postage prepaid, to William E. Carwell, Commerce Title Building, Memphis, Tennessee, 38103, and further mailed three copies to Ernest G. Kelley, Jr., 900 Memphis Bank Building, Memphis, Tennessee, 38103. This 15th day of April, 1980.

Frierson M. Graves, Jr.